SUPREME COURT, U. S.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1969

**No. 134**

In the Matter of the Application

—of—

WALTER MARVIN, JR.

## PETITIONER'S REPLY BRIEF

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## PETITIONER'S REPLY BRIEF

Petitioner's reply brief is addressed only to respondent's assertion that petitioner's Question No. 3 is not properly before this Court.

In its brief in opposition, respondent merged into a single question the first two questions presented in the petition for a writ of certiorari. In fact, the first question raising the First Amendment issue is closely wedded to the second question raising a claim of overbreadth-vagueness. The First Amendment defect in New Jersey's gun control law results from the state's failure to demonstrate that it cannot pursue its substantial interest in firearms control by means less restrictive of free speech and association rights. The First Amendment defect, therefore, sounds in overbreadth. However, as the second question demonstrates, there is another facet to the overbreadth aspect of this case. The New Jersey law encroaches on First Amendment rights that are beyond reach of the state, despite a showing of substantial state interest, cf. *Brandenburg* v.

*Ohio,* 395 U.S. 444 (1969). But it is not clear how far the statute in fact reaches. Hence this second defect of overbreadth merges with a due process defect of vagueness. Consequently, questions one and two are separately presented in the petition to make it clear that both First Amendment and Due Process claims are raised.

The respondent does not contend in its brief in opposition that petitioner neglected to raise or that the courts below failed to pass upon the argument that New Jersey's requirement is unduly vague or unclear in violation of the Fourteenth Amendment's Due Process Clause. Thus, the issue of vagueness is properly before the Court. Respondent seems to argue, however, that only that due process issue was properly raised below. Petitioner respectfully disagrees. The third question stated in the petition is but a variant of the vagueness issue, one which is comparatively unrelated to the overbreadth-First Amendment issue. However, it raises an issue clearly contemplated by the vagueness doctrine and is therefore properly before the Court.

Mr. Justice Brennan's concurring opinion in *United States* v. *Robel,* 389 U.S. 258 (1967), provides one of the most recent full dress analyses of the vagueness doctrine, as distinct from the components of the overbreadth doctrine. His analysis matches the majority's position in *Shuttlesworth* v. *City of Birmingham,* 89 S.Ct. 935 (1969), and demonstrates that when an allegation of vagueness is made, it is taken to include the elements raised in petitioner's second and third questions. As Justice Brennan described it, a vague statute has one or a combination of three deficiencies. "First. . . . [a] failure to provide adequate standards [which] reflects Congress' failure to have made a 'legislative judgment.'" *Id.* at 275. "Second. . . . [A failure to] take steps to assure, 'respect for con-

stitutional liberties' by preventing the existence of 'a wide gulf between the responsibility for the use of . . . power and the actual exercise of that power.' Procedural protections to avoid that gulf have been recognized as essential when fundamental freedoms are regulated." *Id.* at 277-78. "Third. The indefiniteness of the delegation also results in inadequate notice to affected persons." *Id.* at 281. See also *Interstate Circuit* v. *City of Dallas*, 390 U.S. 676, 684-685 (1968).

Petitioner respectfully submits that throughout these proceedings he has contested the constitutionality of the New Jersey law on the ground it is unclear and "void for vagueness." Question 3 in his petition, therefore, is "fairly comprised" in an issue that was properly raised and passed upon below. Rule 23(1)(c), Rules of the Supreme Court.

Respectfully submitted,

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